1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519
1094248.1 82001 1639C 42005519

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, d/b/a)
Ameritech Illinois)
)
) Docket No. 00-0393
)
Proposed Implementation of High)
Frequency Portion of Loop (HFPL)/Line)
Sharing Service)

AMERITECH ILLINOIS' REHEARING BRIEF ON EXCEPTIONS

Theodore A. Livingston
Christian F. Binnig
J. Tyson Covey
Kara K. Gibney
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Nancy J. Hertel
AMERITECH ILLINOIS
225 W. Randolph Street
Chicago, IL 60606
(312) 727-4517

AMERITECH ILLINOIS' REHEARING BRIEF ON EXCEPTIONS

Illinois Bell Telephone Company ("Ameritech Illinois") respectfully submits its Exceptions to the Proposed Order on Rehearing ("Proposed Order").

INTRODUCTION

The Proposed Order would modify the March 14, 2001 Order in this case in important ways. Among other things, it appropriately declines to require the "unbundling" of individual elements of the Project Pronto DSL architecture planned for deployment by Ameritech Illinois, or to require CLEC "collocation" of ADLU line cards in that architecture. Rather, the Proposed Order would require Ameritech Illinois to tariff its end-to-end Broadband Service offering as an "NGDLC UNE," consistent with Staff's proposal on rehearing. This would enable CLECs to use the Pronto DSL architecture to provide competitive advanced services, while avoiding the technical, economic, and operational problems that would arise from the March 14 Order and which helped prompt this rehearing.

This is a significant step in the right direction as compared to the March 14 Order. As explained herein, however, there are problems with the Proposed Order's approach. *First*, at a minimum, the Proposed Order should more clearly describe the Staff proposal and what that proposal would require of Ameritech Illinois with regard to tariffing an end-to-end "NGDLC UNE" and with regard to future technological developments. The Commission also should remove the Proposed Order's reliance on aspects of a non-final Texas arbitration decision, which cannot and should not be imported to Illinois for both legal and practical reasons. Among other things, the Proposed Order would require Ameritech Illinois to import alleged tariff terms and prices established by the Texas decision, when in fact no tariff terms or prices will be approved in Texas for some time to come, and almost certainly will not be approved before the final decision in this case is due. Greater certainty and a more record-based decision would result from adopting Staff's proposal on its own, without relying on future developments in Texas.

Second, Ameritech Illinois continues to disagree with the Proposed Order's interpretation and application of the 1996 Act and the FCC's unbundling rules, particularly as they apply to packet switching functionality and the impair test. The Project Pronto DSL facilities are packet switching facilities, and the legal requirements for ordering unbundling of those facilities under the FCC's rules, even as an end-to-end offering, have not been met. In addition, the Proposed Order improperly attempts to reapply the impair test to these packet switching facilities, even though the FCC has already done so, and in applying that test relies on unsupported assumptions rather than record evidence. Ameritech Illinois also disagrees with any attempt to impose unbundling requirements via tariff rather than the arbitration process prescribed by the 1996 Act.[1]

Third, Ameritech Illinois excepts to the Proposed Order's conclusions on certain of the non-Project Pronto issues, particularly the pricing issues.

ARGUMENT

I. THE PROPOSED ORDER'S CONCLUSION ON PROJECT PRONTO ISSUES SHOULD BE CLARIFIED.

With respect to the Project Pronto DSL issues on rehearing, the Proposed Order states: "We accept Staff's alternative proposal and order Ameritech to file, in Illinois, a tariff identical in all respects, including pricing, delivery intervals and opportunity for the installation of new line cards and services, to the tariff for an end-to-end HFPL UNE ordered by the arbitrators in

[1] The argument on this structural preemption point was fully set out in Ameritech Illinois' Application for Rehearing (at 70-79). That discussion is incorporated herein by reference, but will not be repeated.

Texas." Proposed Order at 33. This statement is confusing because Staff's alternative proposal was not tied to the Texas arbitration decision[2] and that arbitration decision is not final, does not require a tariff, and sets no prices. It is therefore important to review exactly what Staff's alternative proposal is, what the Texas arbitration decision says, and the differences between the two.

Staff's proposal has two components. First, Staff recommended "ordering Ameritech to tariff a complete ADSL capable UNE platform, traversing from the CO to the end user premises." Staff Ex. 1.0 (Clausen) at 11; Staff Br. on Rhg. at 21. Staff called this an "NGDLC UNE platform" and said it would be identical to "SBC's current broadband service." Staff Ex. 1.0 (Clausen) at 11; Rhg. Tr. 1968 (Clausen); Staff Br. on Rhg. at 21. Second, Staff also recommended that "Ameritech should be required to offer a new version of the NGDLC UNE platform as soon as either Alcatel or a licensed manufacturer issues a new line card" and to "offer a modified NGDLC UNE-P when the vendor of Ameritech's NGDLC systems develops the capability to provide multiple Permanent Virtual Paths ('PVPs') per channel bank." Staff Ex. 1.0 (Clausen) at 13-14. On cross-examination, Staff witness Mr. Clausen clarified that what he really meant was not that Ameritech Illinois would have to immediately offer a modified NGDLC UNE-P as soon as a new line card or multiple PVP capability became available; rather, what he proposed was that Ameritech Illinois be required to file a tariff or tariff revisions after Alcatel or a licensed manufacturer develops new line card or multiple-PVP capability, but that Ameritech Illinois could include appropriate terms and conditions in such a tariff to account for any factors it deemed relevant with regard to the potential use of such capabilities. Rhg. Tr. 1269-71. Thus, Staff's proposal deals with both (i) near-term Pronto DSL deployment, through

[2] Arbitration Award, Docket Nos. 22168 and 22469 (Pub. Util. Comm'n of Texas) ("*Texas Arbitration Award*"); Staff Br. on Rhg. at 17-24 (detailing Staff's proposal but never mentioning the Texas decision).

the “NGDLC UNE-P” tariff proposal, and (ii) the potential opportunity for CLECs to make use of features and functions that may become available in the future, subject to appropriate conditions, via the tariff amendment proposal.[3]

Staff’s proposal is clear and stands on its own based on testimony in the record. The Proposed Order states that it is adopting Staff’s proposal, but then seeks somehow to mesh Staff’s proposal with the Texas arbitration decision. The suggestion to import aspects of the Texas decision to Illinois is improper for several reasons.

First, the Texas decision is not yet final. The Texas decision is an arbitration award regarding terms and conditions for arbitrated interconnection agreements. The decision can become final and take effect only when the parties submit contract language to implement the Arbitration Award and that language is approved by the Public Utility Commission of Texas.[4] The Arbitration Award itself directs the parties to “file Interconnection Agreements that comply with the Arbitration Award.” *Texas Arbitration Award* at 173.[5] The timeline for the Texas Commission to approve those agreement terms is not clear. Further, it is impossible to know exactly what terms ultimately will be approved by the Texas Commission. Accordingly, if the Proposed Order remains as is, the Commission would be imposing requirements in Illinois that do not yet exist anywhere, that this Commission has never even seen, and that the Texas Commission may not approve for several months. Such a decision would not only be impossible

[3] Although Mr. Clausen did not address the point, any tariff filed subject to Staff’s proposal would need to be limited to intrastate services, consistent with the legal limits on the Commission’s jurisdiction.

[4] *See, e.g., GTE North Inc. v. Glazer*, 989 F. Supp. 922 (N.D. Ohio 1997); *GTE v. Morrison,* 957 F. Supp. 800 (E.D. Va. 1997); *GTE North v. Strand*, 1997 U.S. Dist. LEXIS 21961 (W.D. Mich. 1997); *GTE Southwest Inc. v. Wood*, No. M-97-003 (S.D. Tex. 1997).

[5] In a Texas pleading supported by Rhythms, Worldcom has agreed that the Texas arbitration award is not final and cannot become final until conforming interconnection agreement language is approved. *See* Worldcom’s Response to Southwestern Bell Telephone Company’s Motion for Reconsideration of Arbitration Award, Dockets 22168 and 22469 (Pub. Util. Comm’n of Texas, filed July 27, 2001).

to implement, as there would be no way for Ameritech Illinois to file a conforming tariff within 30 days when there is nothing from Texas to conform to, but also would abdicate this Commission's decisionmaking responsibility to Texas.

Second, the Proposed Order (at 33) refers to "the tariff . . . ordered by the arbitrators in Texas," but the Texas decision does not require any tariff. As just noted, the Texas case concerns language for interconnection agreements, not tariffs, and directs the parties to file language for interconnection agreements only. No tariff of any kind is required to be filed or will be filed.

Third, the Proposed Order (at 33) would require Ameritech Illinois to import the same "pricing" for the NGDLC UNE-P that is adopted in Texas. But the Texas decision does not establish any price at all and no price will be established any time soon. The Texas PUC made clear that any pricing issues would have to be resolved in a future phase of that proceeding, which obviously could take several months. *See Texas Arbitration Award* at 10. Moreover, even when Texas does establish a price (which undoubtedly will be long after the 30 days that the proposed order gives Ameritech Illinois to file a tariff), it cannot simply be imported lock, stock, and barrel to Illinois. The Illinois Public Utilities Act ("PUA") requires a finding that tariffed rates are just and reasonable before they can take effect in Illinois (220 ILCS 5/9-201 and 9-250), and simply ordering that a Texas rate be imported is not equivalent to a finding that such rate is just and reasonable. The Commission cannot legally delegate its duty to review rates to another state commission, especially when there is no evidence that conditions in the two states are comparable (and with respect to rates they are not, as discussed below). *Cf. Atchison, T. & S.F. Ry. Co. v. Commerce Comm'n*, 335 Ill. 624, 641 (1929); *Moline Consumers Co. v. Commerce*

Comm'n, 309 Ill. 412, 419-20 (1933).[6] Indeed, there could be no finding of justness and reasonableness here, as the record naturally contains absolutely no evidence on any Texas rate.[7]

Perhaps most importantly, under the FCC's TELRIC pricing methodology, UNE prices are ILEC-specific. In other words, rates for Ameritech Illinois' UNEs, such as the proposed NGDLC UNE-P, include certain components that apply only to Ameritech Illinois. These include shared and common costs, fill factors, and cost of capital. These rate components have already been approved by the Commission for Ameritech Illinois as compliant with the 1996 Act[8] and have an established value that is *not* the same as the approved value for those components for SWBT, a separate ILEC, in Texas. Labor costs also factor into UNE prices and those costs too are different in Illinois as compared to Texas. Forcing Ameritech Illinois to import a UNE rate that does not include these approved Illinois rate components would violate the 1996 Act, as the rate for the alleged new UNE would not be "based on the cost . . . of providing the . . . network element" in Illinois. 47 U.S.C. 251(d)(1)(A); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 751 (8th Cir. 2000) ("*IUB III*") ("It is the cost to the ILEC of providing its existing facilities and equipment . . . that must be the basis for the [UNE] charges" under the 1996 Act.)

---

[6] A recent amendment to the PUA gives the Commission "discretion to impose an interim or permanent tariff on a telecommunications carrier as part of the order in a case." 220 ILCS 5/13-501(b). That "discretion," however, does not remove the requirements of Section 9-201 or any other duties of this Commission to render independent decisions.

[7] The Commission has recognized the impropriety of wholesale adoption of another state's rates. For example, the SBC/Ameritech Merger Order originally required Ameritech Illinois to import the Texas rate for the shared transport UNE, but on rehearing changed its mind to merely require use of an Illinois-specific rate that was "reasonably comparable" to the Texas rate. *Compare* Order, Ill. C.C. Dkt. No. 98-0555, at 183-84 (Sept. 23, 1999) *with* Amendatory Order, Ill. C.C. Dkt. No. 98-0555, at ¶ 8 (Nov. 15, 1999). The Commission was even more clear with respect to "long-term" shared transport, specifically excluding "rate structure and price" when directing Ameritech Illinois to use terms and conditions like those in Texas. Order, Ill. C.C. Dkt. No. 98-0555, at 251.

[8] Order, Ill. C.C. Dkt. No. 96-0486/0569 (1998). A recent proposed order in Docket 98-0396 confirms (at 43, 47) that Ameritech Illinois has included these cost components in its UNE rates.

For these reasons, the Proposed Order's reliance on the Texas decision as a supplement to Staff's proposal is improper. There are important differences between that decision and the case here and, in any event, Staff's proposal stands alone. Thus, while Ameritech Illinois disagrees with the Proposed Order's decision (because, as discussed below, it still imposes an improper new unbundling duty), the Proposed Order should at a minimum be revised and clarified both as to the details of Staff's proposal and to eliminate unnecessary reference to and reliance on the non-final Texas arbitration award. The appropriate price for any "NGDLC UNE-P"[9] is the Illinois-specific price for the Broadband Service, which already relies on TELRIC pricing principles, at least until a future proceeding can be held to establish a final price. Proposed replacement language for the Order is included in Attachment A hereto.

II. THE PROPOSED ORDER'S UNBUNDLING REQUIREMENT STILL VIOLATES FEDERAL LAW.

Although the Proposed Order is a significant improvement over the March 14 Order from both a policy and technical feasibility standpoint, the requirement to provide an "NGDLC UNE-P" still does not comply with controlling federal law and therefore should be eliminated.

A. THE PROPOSED ORDER DOES NOT ANALYZE THE PREREQUISITE CONDITIONS TO UNBUNDLING OF PACKET SWITCHING, AND THE RECORD PROVES THEY DO NOT EXIST.

Ameritech Illinois' Brief on Rehearing (at 18) explained that the Pronto DSL architecture (including the NGDLC ATM capabilities, fiber transport, and OCD) provides packet switching functionality and thus could be required to be unbundled only if all four conditions in the FCC's packet switching rule (47 C.F.R. 51.319(c)(5)(i)-(iv)) coexisted in a particular location. The

---

[9] The Proposed Order (at 33) refers to an "HFPL UNE-P." That terminology is inconsistent with the term used by Staff and is potentially confusing. The HFPL is already a UNE. Also, the options available through the Broadband Service encompass much more than just an HFPL option, so the use of the HFPL label is misleading. Thus, the Proposed Order should be modified to use the term "NGDLC UNE" or "NGDLC UNE-P," as Staff did.

CLECs admit that the Pronto DSL facilities provide packet switching functionality[10] and the Proposed Order agrees. Thus, the only way the Commission could require "unbundling" of this packet switching functionality -- as an end-to-end "NGDLC UNE-P" or otherwise -- would be to apply the FCC's rule.

The Proposed Order, however, dismisses the packet switching issue with one sentence, stating "we reiterate that all of the requisite circumstances set forth in Section 51.319[(c)(5)] are present in Illinois." Proposed Order at 32. The Proposed Order also rejects the argument that the four conditions in the FCC's rule must be analyzed on an RT-by-RT basis and concludes (in its impairment analysis) that DSLAM collocation is not a viable option because of alleged "lack of collocation space at RTs, timeliness and poor economics."

This failure to apply the FCC's rule is reversible legal error. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Astroline Comms. Co., L.P. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988) (decision was arbitrary and capricious where FCC failed "to proceed analytically according to the statutory inquiry"). One of the reasons the Commission granted rehearing was that the March 14 Order failed to address the four conditions required by the FCC's packet switching rule. *See* Am. Ill. Appl. for Rhg. at 24. The Proposed Order, however, commits the same error by continuing to require unbundling of packet switching without actually analyzing those four conditions or explaining how or why they could exist in Illinois. And even if the conditions did not have to be applied on an RT-by-RT basis (although Ameritech Illinois believes they must), the FCC's rule still has to be applied, and there still would have to be at least a finding that the four conditions exist somewhere in Illinois. But there is no such finding. This lack of explanation for the decision fails to meet the requirements of

[10] Rhythms Rhg. Ex. 1.0 (Watson) at 16; Sprint Rhg. Ex. 3.0 (Burt) at 16; Rhg. Tr. 1899-1901 (Starkey).

administrative law. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405-06 (D.C. Cir. 1995).

Furthermore, the FCC's rule clearly *does* require an RT-by-RT analysis. The FCC required that all four conditions of its rule be met because only in that particular confluence of circumstances would an unbundling requirement be appropriate under the 1996 Act. *UNE Remand Order*, ¶ 313.[11] The FCC accordingly decided not to require unbundling of packet switching, with "one limited exception" for locations where all four conditions were met. *Ibid.* The Proposed Order, however, turns the FCC's rule on its head by apparently requiring packet switching to be unbundled whenever the four conditions allegedly exist anywhere in the same state. For example, if the FCC's rule did not have to be applied on an RT-by-RT basis, then in a situation where condition 1 was met in Lake Forest, condition 2 in Kankakee, condition 3 in DeKalb, and condition 4 in Peoria, the Commission could require unbundling of packet switching throughout the entire state. That cannot be what the FCC intended by its "one limited exception." Moreover, the FCC has made clear that unbundling requirements can be limited to particular geographic areas or market segments and has itself imposed such limits. *UNE Remand Order*, ¶¶ 276-99. Such a limit is inherent in the prerequisite conditions of the packet switching rule, which are not a statewide checklist, but rather a location-specific clutch of circumstances that must coexist at the same spot before unbundling can be required. The Proposed Order therefore errs in not applying the packet switching rule on an RT-by-RT basis. Had it done so, there could be no unbundling requirement, even of the end-to-end Broadband Service, as the

[11] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, FCC 99-238 (rel. Nov. 5, 1999).

record is devoid of any evidence of a particular location in Illinois where any one of the four conditions exists today, much less all of them. Am. Ill. Br. on Rhg. at 19-29.[12]

The only one of the four packet switching conditions that the Proposed Order could be said to address at all is the third, which concerns DSLAM collocation at RTs (though the Proposed Order mentions this only in the context of its impairment analysis, and not under the packet switching rule). The Proposed Order (at 33) asserts that DSLAM collocation at RTs is subject to "problems associated with lack of collocation space at RTs, timeliness and poor economics." But there was no actual evidence of any such problems in the earlier phase of this case, nor is there any credible evidence now. The Proposed Order attempts to support its conclusion on rehearing by relying on Sprint's new claim that collocation of a DSLAM in a Kansas RT cost around $130,000, calling this evidence "unrebutted" and concluding that it shows why collocating a DSLAM at 2,100 Pronto RTs in Illinois would not be feasible. Proposed Order at 33. This assertion, however, is flawed on several counts.

First, Sprint's allegations were not "unrebutted" – they were *conclusively* rebutted by Mr. Welch, Mr. Boyer, Dr. Aron, Sprint's own witnesses, and Sprint's own documents.

?? Mr. Welch explained why Sprint's collocation request in Kansas was unusual, in that it involved oversized equipment that raised safety concerns, and thus cannot be viewed as generally representative of DSLAM collocation at RTs. Am. Ill. Rhg. Ex. 6.1 (Welch) at 4-5.

?? Mr. Boyer, in turn, explained that DSLAM collocation at an RT can be much less expensive, costing less than half of Sprint's inflated example. Rhg. Tr. 1212-13.

---

[12] The Proposed Order may be assuming that all four conditions will exist everywhere Project Pronto DSL facilities are deployed. That approach cannot stand. To begin with, Pronto DSL facilities have not been deployed in Illinois, so the Proposed Order's assumptions about what conditions would exist when and if those facilities are deployed conflicts with the FCC's requirement to apply the impair test to *current* market conditions. *UNE Remand Order*, ¶ 62; *see* Am. Ill. Appl. for Rhg. at 28-30. Further, as explained below and in Ameritech Illinois' Brief on Rehearing, the FCC's requirement that the ILEC have "not permitted" collocation of a DSLAM at an RT has not been met in Illinois and would not be met when Pronto DSL facilities are deployed, as the *Project Pronto Order* requires Ameritech Illinois to overbuild new RTs and take other steps to ensure DSLAM collocation at RTs is available.

?? Dr. Aron conducted an analysis showing that even if one accepted Sprint's worst-case numbers, the investment cost per potential customer for DSLAM collocation at an RT was still *less* than the similar investment that cable modem service providers have to make to offer the same service to each potential customer. Am. Ill. Rhg. Ex. 8.1 (Aron) at 11-14. Likewise, Staff witness Clausen could give no example of an RT where DSLAM collocation would be too costly on a per-customer basis, or where DSLAM collocation would be impossible. Rhg. Tr. 1955, 1957.

?? Sprint witness Burt admitted that the same costs involved at the Kansas RT would not occur at all other RTs. Rhg. Tr. 1847.

?? Sprint witness Staihr admitted that DSLAM collocation is economically feasible at many RTs, even from Sprint's viewpoint. Rhg. Tr. 1804.

?? And finally, just a few weeks ago Sprint passed out a public document describing how *collocation of DSLAMs at RTs is a central part of its going-forward business plan*, which proves that such collocation cannot be deemed economically infeasible. Rhg. Tr. 1863 (Burt Cross Ex. 3).

Second, the assumption that any CLEC would need or want to collocate at 2,100 different RTs is completely unrealistic. CLEC business plans target the most profitable customers first (*see* Tr. 1431-32 (Watson)) and those customers obviously are not going to be spread out over 2,100 RTs. There is no need for CLECs to be collocated in all Pronto RTs before they begin competing, and in all likelihood CLECs will never want to provide service from every single Pronto RT (although, with the Broadband Service, they could do so as soon as facilities are deployed, if they so desired).

Third, focusing again on the FCC's packet switching rule, it is undisputed that no CLEC has ever requested DSLAM collocation at an RT in Illinois or been denied DSLAM collocation in an RT in Illinois.[13] The third condition of the FCC's packet switching rule can be met *only* if the ILEC "*has not permitted*" DSLAM collocation in an RT. 47 C.F.R. 51.319(c)(5)(iii) (emphasis added). There has been no such ILEC denial of RT collocation here, and the CLEC's

[13] Am. Ill. Rhg. Ex. 6.0 (Welch) at 12; Am. Ill. Rhg. Ex. 6.1 (Welch) at 2; Rhg. Tr. 1801-02 (Staihr); Rhg. Tr. 1935 (Carter); Rhg. Tr. 1907 (Gindlesberger); Rhg. Tr. 1955-56 (Clausen).

self-serving, and unsupported, claims of economic infeasibility or other problems are irrelevant to the FCC's rule and insufficient as a matter of law. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999(("*IUB II*"); *GTE Service Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000). It therefore is clear that condition 3 of the FCC's packet switching rule has not been met *anywhere* in Illinois. Failure of any one of the four conditions means, as a matter of law, that the Commission cannot require the unbundling of packet switching functionality, such as that provided by the Pronto DSL facilities, in Illinois.

B. THE IMPAIR TEST CANNOT BE REAPPLIED TO THE PRONTO PACKET SWITCHING FACILITIES, AND THE PROPOSED ORDER'S REASONS FOR FINDING IT MET ARE NOT SUPPORTED BY THE LAW OR EVIDENCE.

The Proposed Order spends a page applying the FCC's impair test to the Pronto DSL architecture, finding that the test is met. Proposed Order at 33. It appears that this finding is part of the basis for requiring the unbundling of an NGDLC UNE platform, as any proposed UNE must "at a minimum" meet the impair test. 47 U.S.C. 251(d)(2). The Proposed Order's reasoning, however, is not supported by the law or the facts.

First, as a threshold matter, the FCC has already applied the 1996 Act and the impair test to packet switching facilities – such as those that make up the Pronto DSL architecture – and the outcome of that analysis is the FCC's packet switching rule and its very limited conditions for unbundling. As a matter of law, this Commission cannot reapply the 1996 Act's unbundling standards where the FCC has already applied them, as explained in Ameritech Illinois' Brief on Rehearing (at 29-31, citing cases). Any attempt to do so is preempted and in direct conflict with the structure of the Act and the Supreme Court's decision in *IUB II*, 525 U.S. at 378 n.6. The Proposed Order's re-application of the impair test instead of the FCC's packet switching rule is therefore impermissible and cannot form a legally legitimate basis for any unbundling requirement.

Second, the Proposed Order's application of the impair test is erroneous. It begins by rejecting the Broadband Service offering as a viable alternative to "unbundling" requirements, claiming that Ameritech Illinois would act as the "gatekeeper" of services provided over the Pronto DSL architecture. That is not correct. The FCC stated several times that CLECs using the Broadband Service could differentiate their service offerings and thereby compete directly with the SBC ILECs' affiliates. *Project Pronto Order*, ¶¶ 23, 30 n.82, 40, and 45.[14] The FCC also required SBC to host quarterly national collaboratives to discuss future developments regarding the Pronto DSL architecture. *Id*., App. A at 42. The Proposed Order fails to even mention the *Project Pronto Order*, which has to form a central part of any thorough analysis in this case.

The Proposed Order next states that the Broadband Service could be "modified or withdrawn at Ameritech's whim, once the period associated with the merger commitments expires." Proposed Order at 33. That too is incorrect. Ameritech Illinois proposed in its direct testimony to extend the availability of the Broadband Service well beyond the time required by the FCC merger conditions. Am. Ill. Rhg. Ex. 1.0 (Ireland) at 32-33; Tr. 360-61 (Ireland). The Proposed Order never mentions that proposal, much less explains why this three-year commitment – which is a lifetime in the broadband market ? is not long enough.

Finally, the Proposed Order asserts that the Broadband Service would be "subject to price and term manipulation." Proposed Order at 33. There is no record evidence of such manipulation, nor does the claim make sense. The Broadband Service is subject to the strictures

[14] Second Memorandum Opinion and Order, *Ameritech Corp. and SBC Communications Inc.*, CC Docket 98-141, FCC 00-336 (rel. Sept. 8, 2000).

of the *Project Pronto Order* already. Further, if a CLEC signs a Broadband Service agreement, as Ameritech Illinois has proposed, the price for that service and period of its availability would be set by contract and thus not subject to unilateral modification. In this regard, use of a negotiated contract process is preferable to any tariff, as it allows the CLEC to lock in the availability of service. The Proposed Order disputes this fact based on alleged "recent news accounts," but the Proposed Order fails to identify such "news accounts," and such unidentified accounts are not part of the evidentiary record on which any decision must be based.[15] 220 ILCS 5/10-103. There are many reasons for CLEC business difficulties, including bad business plans and bad financing plans, and those problems cannot be blamed on the ILECs.

The Proposed Order also refuses to consider the availability of alternative technologies for providing advanced services (such as cable modem, wireless, and satellite), saying that reference to such alternatives "simply begs the question of [Ameritech Illinois'] obligation to provide requesting carriers access to its network under relevant state and federal statutes." Proposed Order at 33. But it is the Proposed Order that begs the question. It goes without saying that the issue is what Ameritech Illinois' obligations should be under the relevant state and federal statutes – that is why this case exists. The real question, then, is whether evidence regarding other technologies that are used to provide competing service in the same market is relevant in deciding what those legal obligations should be. It clearly is, as the Commission

[15] It is easy enough to find news accounts on both sides of the fence. The Proposed Order may be referring to news accounts where CLECs blame ILECs for the CLECs' business difficulties, yet there are also accounts of sworn affidavits by one CLEC's employees that it has an established corporate policy of simply blaming the ILECs for every problem, whether the ILEC bears any blame or not. *See, e.g.*, Shawn Young, "Verizon Sues DSL Competitor Covad," *Wall St. J.*, Tuesday, June 12, 2001, at B9 ("Verizon's suit . . . says Covad managers instructed employees to deceptively shift blame to Verizon for many of the technical difficulties Covad has in providing its high-speed Internet service using digital subscriber line technology" and is supported by affidavits from several former Covad employees).

presumably found when deciding to let in all of Ameritech Illinois' rehearing evidence on this point, and as the relevant law provides.

The controlling provisions for deciding Ameritech Illinois' unbundling obligations are Sections 251(c)(3) and 251(d)(2) of the 1996 Act and FCC Rule 317. The Supreme Court has held that these require the Commission to consider alternatives available to CLECs in lieu of imposing new unbundling obligations. 47 C.F.R. 51.317(b)(1) (requiring a "totality of the circumstances" analysis); *IUB II*, 525 U.S. at 389. This includes alternatives "outside" the incumbent LEC's network, such as alternative broadband technologies. *See UNE Remand Order*, ¶ 307 (citing evidence of infrastructure deployment by cable companies as part of its impair analysis). Moreover, even if these were not viable alternatives for CLECs (though they plainly are, as the CLECs are already using them), competition from these alternative technologies is relevant to the analysis under FCC Rule 317(b)(3), which looks to the 1996 Act's overall goals of promoting both advanced services deployment and advanced services competition. The existence of competing technologies also affects the retail prices that DSL providers can charge, which affects their expected return, which in turn affects their incentive to invest in advanced services facilities at all. Choosing to ignore these competitive alternative technologies in the impair analysis is inconsistent with controlling federal law and the rules of reasoned decisionmaking. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

The undisputed evidence further shows that CLECs can and do use a variety of technologies to provide competitive advanced services. *See* Am. Ill. Br. on Rhg. at 37; Am. Ill. Pet. for Interlocutory Review at 8. By closing its eyes to the availability of those different technologies, the Proposed Order posits *sub silentio* that there is some unique "DSL market," when the evidence is uncontroverted that no such DSL market exists. The Proposed Order improperly focuses on one type of technology (DSL) and one type of competitor (those who limit themselves to DSL). That focus on favored *competitors* rather than *competition* and the interests of consumers is inconsistent with the goals of the 1996 Act. *See First Advanced Services Report*, ¶ 5 ("Our role is not to pick winners and losers, or to select the best technology to meet consumer demand.")[16] Moreover, cable modem providers do indeed provide a telecommunications service and thus are "telecommunications carriers" that should be considered as part of the same market for purposes of an impairment analysis. *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) ("[T]o the extent that [a cable modem provider] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.") To ignore the competing technologies in the same market based on a theory that such technologies are irrelevant to the unbundling requirements of the 1996 Act is equivalent to stating that Congress gave the Commission no option other than to reach an economically nonsensical and highly anticompetitive result: that secondary players in a highly competitive market should be subject to asymmetric unbundling obligations. To state the argument is to refute it.[17]

The Proposed Order further and erroneously rejects DSLAM collocation at an RT and the use of existing UNEs as a competitive alternative. The legal and factual errors in that analysis

---

[16] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket 98-146, FCC 99-5 (rel. Feb. 2, 1999).

[17] The Proposed Order also refuses to consider Ameritech Illinois' estimate of potential costs arising from the March 14, 2001 Order's Project Pronto requirements. The Proposed Order calls the analysis a "doomsday 'cost study'" that is unrelated to reality. As Ameritech Illinois thoroughly explained, however, the analysis was not presented as a "cost study" at all. Cost studies are used to set rates for products or services. This, by contrast, was a high-level analysis for executives to use in examining possible risks as they made the decision whether to suspend deployment of Pronto DSL facilities in Illinois. Am. Ill. Rhg. Ex. 1.1 (Ireland) at 2-3. As Mr. Ireland explained, SBC and Ameritech Illinois probably would have suspended deployment even if the projected incremental costs had been only a fraction of those resulting from the cost analysis. *Ibid*. It was undisputed that the March 14, 2001 Order would impose at least some costs on Ameritech Illinois and that such costs would increase the risk associated with Pronto DSL deployment. Rhg. Tr. 1789-91 (Staihr). Increased costs to the ILEC cannot be completely ignored in any legitimate impairment analysis.

are discussed above with respect to packet switching. There is absolutely no evidence of a "lack of collocation space at RTs" in Illinois (or elsewhere), or a lack of "timeliness" in provisioning DSLAM collocation at RTs in Illinois (or elsewhere), or economic infeasibility of such collocation in Illinois (or elsewhere). Nor are these factors even relevant to the FCC's packet switching unbundling rule. Moreover, the Supreme Court has made clear that mere cost considerations, even if they existed, cannot support a finding of impairment. *IUB II*, 525 U.S. at 389.

Accordingly, for the reasons just given and for the reasons detailed in Ameritech Illinois' Brief on Rehearing (at 29-51), the facts and the law cannot support any requirement to unbundle the Pronto DSL packet switching facilities, even if the impairment test could be reapplied by a state commission after the FCC has already applied it. The Proposed Order should therefore be revised as described in Attachment A hereto.

C. THE SUMMARY OF THE CLECS' AND STAFF'S POSITIONS ON THE PROJECT PRONTO ISSUES SHOULD BE AMENDED TO FOLLOW TRADITIONAL COMMISSION PRACTICE.

The Proposed Order's description of Ameritech Illinois' position on the Project Pronto issues follows the traditional Commission practice of prefacing many statements by saying "Ameritech Illinois argues . . ." or something to the same effect. The Proposed Order does not do so, however, in its description of the CLECs' and Staff's positions, which makes them read more like statements of fact than a mere summary of position. Although those familiar with Commission orders will recognize that a mere description is just that, the lack of a consistent form could be confusing to an appellate court. Accordingly, the descriptions of CLEC and Staff positions on the Pronto issues should be revised to follow the usual format, as indicated in Attachment A.

III. HFPL-RELATED CHARGES.

The Commission should reject the Proposed Order's recommendation that Ameritech Illinois charge nothing for the HFPL UNE, for HFPL-related OSS modifications and for manual loop qualification. Before reaching the specific errors of the Proposed Order's recommendations, as a general matter, a zero price for any or all of these items does not satisfy the TELRIC standard, nor does a zero price satisfy the constitutional requirement that "just compensation" be paid when private property is taken. Moreover, from a policy perspective, permitting CLECs to obtain these services and assets for free (while other providers of advanced services pay a positive price for the facilities they use to provide service) would give data CLECs using the HFPL UNE an unfair, artificial, state-sanctioned competitive advantage in the advanced services market.

The record clearly establishes that there are costs associated with HFPL-related OSS modifications, manual loop qualification and the HFPL UNE. In fact, in its original Order in this docket, the Commission acknowledged that Ameritech Illinois *does* incur costs for HFPL-related OSS modifications,[18] and neither Staff nor the CLECs dispute this finding. The CLECs and Staff also do not dispute that Ameritech Illinois *does* perform manual loop qualifications for CLECs, and performing such work undeniably creates costs for Ameritech Illinois. In fact, Staff acknowledges that "Ameritech's proposed rate for manual loop configuration is reasonable," but nevertheless inexplicably recommends that Ameritech Illinois "not be allowed to recover costs for manual loop qualification." Staff Rhg. Br. at 28. It also is beyond dispute that the HFPL UNE is a UNE that *shares* the costs of a loop with the other services and products provided over

[18] In the original order, the Commission stated that "Ameritech–IL may incur costs in relation to OSS modification," but nevertheless disallows any recovery of those costs, because Ameritech Illinois' proposed charges purportedly "are not supported with evidence in the record." Order at 88. That evidence now unquestionably *is* part of the record. For this reason alone, the Proposed Order's recommended $0 charge has no record support and is unlawful.

that loop, and that the HFPL is a valuable asset for ILECs and CLECs alike. As the FCC and virtually all economists addressing the issue have recognized, and as explained in Ameritech Illinois' Brief on Rehearing, the HFPL contributes to the cost of the loop. Given that Ameritech Illinois incurs costs in modifying its systems, performing manual loop qualifications, and providing the HFPL UNE, the Proposed Order's zero price recommendations cannot withstand legal scrutiny.

A zero charge for any or all of these items would effect a taking of Ameritech Illinois' property without just compensation – indeed, without any compensation – which is unconstitutional.[19] In addition to violating the Takings Clause, a zero price for these items fails to comport with TELRIC principles. TELRIC itself is intended – as required by Section 252(d)(1) of the 1996 Act – to establish "just and reasonable rates while providing the incumbent LEC with a reasonable profit."[20] Requiring Ameritech Illinois to provide the HFPL UNE, HFPL-related OSS modifications, or manual loop qualification to CLECs for free clearly is not "just and reasonable," nor does it provide Ameritech Illinois with "a reasonable profit."

As Ameritech Illinois explained in its Brief on Rehearing, Illinois courts have reversed decisions by this Commission that completely denied compensation for the use of a utility's facilities or services, as the Proposed Order recommends here. *See Illinois Bell Tele. Co. v. ICC*, 286 Ill. App. 3d 340, 341 (3[d] Dist. 1997) (Commission decision to deny Ameritech Illinois' request for compensation for the use of its payphone facilities beyond the revenue received for

---

[19] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989); *Tenoco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1020 (1[st] Cir. 1989); *Mississippi River Fuel Corp. v. FPC*, 163 F.2d 433, 437 (D.C. Cir. 1947). Takings principles still apply under the 1996 Act: "Suffice it to say that this court construes the Act to require that just and reasonable compensation be paid for the services GTE provides to MCI" under their interconnection agreement. *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1158, 1170 (D. Or. 1999).

[20] *Southwestern Bell Tel. Co. v. AT&T Communications*, No. A 97-CA-132SS, 1998 WL 657717 at *13 (W.D. Tex. 1998).

carrier access services reversed and remanded by the Court); *Citizens Utilities Co. of Illinois. v. ICC*, 153 Ill. App. 3d 28, 35 (3d Dist. 1987) (Commission's decision to deny Citizens any working capital allowance reversed and remanded by the Court); *Candlewick Lake Util. Co. v. ICC*, 122 Ill. App. 3d 219 (2d Dist. 1983) (Commission decision to apply a zero rate of return to a substantial part of the property of the utility reversed and remanded by the Court). In light of this precedent, the Commission should be wary of the Proposed Order's recommendation to deny Ameritech Illinois recovery of any costs for the HFPL UNE, for HFPL-related OSS modifications and for manual loop qualification.

Aside from the blatant illegality of the zero prices recommended by the Proposed Order, allowing CLECs to reap a windfall through the free use of Ameritech Illinois' valuable assets and services would give data CLECs an unfair, artificial competitive advantage in the advanced services market. Permitting data CLECs to pay virtually nothing for the facilities, services and systems modifications necessary to permit them to utilize the HFPL UNE and provide advanced services, while other providers of advanced services pay a positive price for the facilities they use to provide service, is inequitable, contrary to efficient competition, and fundamentally at odds with the pro-competitive purposes of the 1996 Act.

For these reasons, and the reasons set forth below, the Commission should reject the Proposed Order's recommended zero prices for the HFPL UNE, for HFPL-related OSS modifications and for manual loop qualification. Ameritech Illinois' proposed prices for the above items are reasonable, accurately represent the costs Ameritech Illinois actually will incur to provide them, and should be adopted by the Commission. *See* Am. Ill. Rhg. Br. at 115-117, 128-135.

A. MONTHLY RECURRING CHARGE FOR THE HFPL UNE.

1. ADOPTION OF THE PROPOSED ORDER'S RECOMMENDED ZERO PRICE FOR THE HFPL UNE WOULD BE UNLAWFUL.

In addition to violating the Takings Clause (as explained above), adoption of the Proposed Order's recommended zero monthly recurring charge for the HFPL UNE would violate the 1996 Act, because that recommendation irreconcilably conflicts with the legal requirements of Sections 252(c) and 252(d)(1).[21]

As a threshold matter, the Proposed Order's conclusion that Ameritech Illinois purportedly did not prove any "incremental costs" associated with the HFPL misapplies the FCC's TELRIC methodology, in terms of both law and economics. The FCC expressly acknowledged in its *Line Sharing Order* (¶ 138) that, when a loop is used to provide multiple services (as is the case when a CLEC leases the HFPL), the long run incremental costs of the loop ? the LRIC in TELRIC ? are no longer incremental to *any* particular service or product provided over the loop. Instead, these incremental costs are incremental to *all* of the products and services provided over the loop. In economic parlance, these long run costs, which are *incremental* to the *loop* itself, are *shared* costs among the products and services provided over the loop. But, as the FCC concluded, the fact that economists regard these costs as "shared" costs does not mean that the costs no longer exist or should not be recovered through its TELRIC pricing methodology. On the contrary, the FCC recognized that some portion of these costs should be allocated to and recovered from the HFPL. *Id.*, ¶ 138.

In addition, the Proposed Order relies on the irrelevant (and incorrect) claim that Ameritech Illinois did not provide evidence that its current retail rates fail to recover 100% of the

---

[21] As noted below, and as acknowledged by the Washington Commission, a zero price for the HFPL UNE also would violate Section 254(k) of the Act.

costs of the loop. Despite the Proposed Order's suggestion to the contrary, Ameritech Illinois was not required to provide such evidence, because retail rates are irrelevant in setting the price of UNEs. Indeed, Section 252(d)(1) of the Act states that a state commission's determination of UNE prices *shall* be "based on the cost (*determined without reference to a rate-of-return or other rate-based proceeding*) of providing the network element" and "may include a reasonable profit." (Emphasis added.) In other words, determining what charge applies to CLECs for their purchase of the HFPL does not and cannot depend on what charge an end-user pays for the voice portion of the line. Whether UNE-related costs are currently being recovered by retail voice services is irrelevant in setting the price of UNEs. With regard to the HFPL UNE in particular, the FCC necessarily found that any potential for "double recovery" of such costs through retail rates was irrelevant when it established, in its Order approving the SBC/Ameritech merger, a surrogate HFPL price of 50% of the cost of an entire unbundled loop for unaffiliated CLECs when actual line sharing was not available.[22]

Putting aside the illegality of the Proposed Order's "rate of return" analysis, the record establishes that Ameritech Illinois likely does not recover its full loop costs through retail rates. *See* Am. Ill. Rhg. Br. at 118-121. *First,* Ameritech Illinois has not been subject to rate-of-return regulation since 1994, as it has been subject to price cap regulation since that time, and therefore has no assurance that it will recover the entire cost of the loop—including all shared and common costs—in retail rates. *Second,* the existing retail rates were set under the assumption that Ameritech Illinois would serve all the demand for those services. This assumption no longer

[22] *Applications of Ameritech Corp. and SBC Communications, Inc.*, 14 FCC Rcd 14712, para. 467; Appendix C (Conditions Appendix), ¶ 14 (rel. Oct. 8, 1999) ("*SBC/Ameritech Merger Order*") (emphasis added).

holds true today, as Ameritech Illinois' retail products now face competition from CLECs.[23] *Third,* much of the loop costs are related to capital investments that must be recovered over a period of years, and therefore consideration of current revenues is insufficient to determine whether Ameritech Illinois will fully recover all of the costs of unbundled loops. *Fourth,* CLECs target high use customers that contribute more to the recovery of total loop costs and, as these customers are lost to the CLECs, their contribution to Ameritech Illinois' overall recovery of its loop costs is lost.[24] *Fifth,* competition will preclude Ameritech Illinois from over-recovering its loop costs. Am. Ill. Ex. 3.0 (Carnall) at 20-21.[25] In short, although retail rates should not (and cannot) be considered in setting the price of the HFPL UNE, the record establishes that it is unlikely Ameritech Illinois recovers the entire cost of the loop ? including all shared and common costs ? in its retail rates. The CLECs have presented no evidence to the contrary.[26]

[23] Indeed, there are now about 59 CLECs active within Ameritech Illinois' territory. At the end of 1999, these CLECs served approximately 542,688 lines, 285,116 of which were provided by means other than resale. Am. Ill. Ex. 3.0 (Carnall) at 20-21.

[24] Significantly, there is no basis to assume that the availability of the HFPL UNE will have a positive effect on Ameritech Illinois' revenues. For example, the HFPL UNE allows customers who currently maintain a second phone line specifically for dial-up Internet access to discontinue that line without affecting their ability to make phone calls while connected to the Internet, thus depriving Ameritech Illinois of the revenues generated from that second line. The development of voice over DSL may also have an adverse effect on Ameritech Illinois' revenue. In fact, as CLECs become capable of providing several voice circuits over one DSL line, Ameritech Illinois' revenues will, in all likelihood, decline. As noted above, recovery of loop assets requires not just current, but sustained, revenue. Am. Ill. Ex. 3.0 (Carnall) at 20-21.

[25] These five reasons are explained in more detail in Ameritech Illinois' Brief on Rehearing (at 118-121).

[26] Even if the Commission has concerns that allocating part of the loop cost to the HFPL could cause an over-recovery of loop costs in total, the proper solution, both as a matter of law and policy, is not to set a zero price for the monthly recurring HFPL charge, as the Proposed Order recommends. Rather, the Commission should consider the "retail rates" issue in a separate proceeding. Indeed, it would be necessary to look at, among many other things, current long run service incremental costs ("LRSIC") plus shared costs for local exchange (voice) access lines, the relationship between current rates and these LRSIC plus shared costs, and what (if any) common costs are currently recovered by local exchange access lines. It also would be necessary to determine what impact the revenues resulting from HFPL services, based on proper HFPL prices and projected demand, would have on the overall recovery of loop costs. In addition, past and current policy-based factors, such as any universal support flows to local exchange service rates that might exist, and the implications of such universal support flows on local exchange rates, would need to be examined.

In short, it is unreasonable, unlawful and unwise to set the monthly recurring price of the high frequency portion of the loop at zero simply because of a legally irrelevant and unsupported hypothesis that charging anything above zero would allow Ameritech Illinois to over-recover its loop costs. Nor would it be appropriate to set the monthly recurring HFPL price at zero simply to avoid addressing the issue of whether Ameritech Illinois' retail rates might ultimately need to be adjusted. The controlling law established by Section 252(d) of the Act and the FCC's own pricing directives in its *First Report and Order* and *Line Sharing Order* (not to mention this Commission's prior conclusions in Dockets 96-0486/0569), including the FCC's directive that all UNEs should contribute to the recovery of shared and common costs, mandates that the HFPL price must be set at some positive amount.

2. OTHER STATE COMMISSIONS HAVE ADOPTED A POSITIVE PRICE FOR THE HFPL UNE.

Several state commissions have rejected CLEC proposals to set the price of the HFPL UNE at zero, and instead have adopted a *positive* price for the HFPL UNE. These state commissions include the Connecticut Department of Public Utility Control,[27] the Washington Utility and Transportation Commission[28] and the California Public Utility Commission.[29] The analysis performed by these state commissions is instructive, and demonstrates that the

[27] Decision, *Application of Southern New England Telephone Company for a Tariff to Introduce Unbundled Network Elements,* Docket No. 00-05-06, 2001 Conn. PUC LEXIS 141 at *20 (Conn. Dept. of Pub. Util. Control, June 13, 2001) ("*Conn. PUC Decision*").

[28] Thirteenth Supplemental Order, *Costing and Pricing of Unbundled Network Elements, Transport, and Termination,* Docket No. UT-003013, 207 P.U.R.4th 379 at *70 (Wash. Util. and Transp. Comm., January 31, 2001) (adopting a flat rate of $4.00 for the use of the high frequency portion of the loop) ("*Wash. Thirteenth Supp. Order*").

[29] Interim Opinion, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominate Carrier Networks,* Rulemaking 93-04-0003, *Investigation on the Commission's Own Motion Into Open Access and Network Architecture Development of Dominant Carrier Network,* Investigation 93-04-002, 2000 WL 1875844 at *11 (Cal. Pub. Util. Comm., Sept. 21, 2000) (adopting on an interim basis a charge of $5.85 per month for Pacific, and $3.00 per month for GTE for use of the high frequency portion of the loop) ("*Cal. Interim Opinion*").

Commission should (and legally must) reject the Proposed Order's recommendation to set the monthly recurring price of the HFPL UNE at zero.

More specifically, the Connecticut Commission adopted an ILEC price proposal virtually identical to that proposed by Ameritech Illinois here. The Connecticut Commission held that the ILECs' "proposed allocation of 50% of the local loop costs is reasonable for the high frequency portion of the loop." *Conn. PUC Decision* at *55. In support of its conclusion, the Connecticut Commission stated that "loop costs can be reasonably allocated among the services that use the loop. Obviously, the loop was constructed for more than basic local exchange service and can not be considered the sole cost responsibility of basic local exchange service. New users of the loop must be encouraged and should reasonably share in the cost of providing the loop." *Id.* at *55-56. Perhaps more importantly, consistent with Ameritech Illinois' position in this case, the Connecticut Commission found that "[t]he argument of Rhythms and other parties that the incremental cost of providing the high frequency portion of the loop is zero is not particularly useful." *Id.* at 55. Like the Connecticut commission, this Commission should reject Rhythms' erroneous and unsupported argument that there is no incremental cost to providing the HFPL UNE, and allocate the cost of the loop equally between the two services that cause the cost—the high frequency and low frequency portions of the loop.

Turning to the Washington commission's decision on the HFPL UNE price, that decision also is consistent with Ameritech Illinois' position that, in instances where a CLEC leases the HFPL, the loop is a shared cost that should be allocated between the two services that cause the cost. The Washington Commission found:

> Consistent with the FCC's requirement that all UNEs make a contribution toward shared costs, we establish a non-zero HUNE price. . . . We find that the loop is a shared cost used by voice and advanced telecommunication services. LECs provisioning

> advanced telecommunication services should provide a contribution to the cost of the loop in the same way in that LECs provisioning voice services made a contribution to the cost.

Wash. Thirteenth Supp. Order at *15-16.

The Connecticut and Washington commissions' analyses (and Ameritech Illinois' position) comport with the FCC's analysis in the *Line Sharing Order*. As noted above, the FCC explained in the *Line Sharing Order* that, when a single loop facility is used to provide Ameritech Illinois voice service and CLEC advanced services on the HFPL, the loop becomes a cost that is shared by those two uses. Because one loop is shared among providers and services, there is no economically unique way to establish the loop cost that each service causes. Rather, use of the FCC's prescribed TELRIC methodology only allows establishment of the cost of the shared facility, i.e., the loop. Since cost causation cannot be established between the HFPL and the voice portion of the loop, pricing of the two uses necessarily requires an allocation of the shared loop cost. *Line Sharing Order* at ¶138. Because there is no reason to place a greater value on the low frequency portion of the loop than on the high frequency portion, common sense and basic economic principles dictate that the loop costs be allocated equally between the two uses.

The Washington commission further found that a zero price for the HFPL UNE would violate the Act, in particular, Section 254(k), which prohibits a telecommunications carrier from using non-competitive services to subsidize services that are subject to competition, and requires the FCC and state commissions to establish the necessary cost allocation rules to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services. The Washington commission stated:

> Because the loop is used to provide both basic exchange and advanced services, recovering the entire cost of the loop from voice services would violate Section 254(k) of the Act. Because the cost of the loop is considered to be a shared cost for the provision of voice and advanced services, we conclude that a portion of the cost of the loop should be recovered from LECs providing advanced services and specifically digital subscriber line services. We base this conclusion on FCC pricing guidelines, our reading of the 1996 Telecommunications Act, the Commission's prior orders, and our rejection of argument that there is a zero cost associated with providing the HUNE.

Wash. Thirteenth Supp. Order at *15-16.

Ameritech Illinois' position on the HFPL UNE monthly recurring price also is consistent with the California commission's decision on the issue. The California Commission found that "a zero rate is not in the public interest, convenience, and necessity," and therefore "reject[ed] a zero rate in the interim." *Cal. Interim Opinion* at *8. In support of its positive interim price, the California Commission stated that "the Act requires that UNE rates be just, reasonable and nondiscriminatory" and "it is presumptively unreasonable to find a just, reasonable, and nondiscriminatory interim rate . . . for use of the high frequency portion to be zero." *Id.* at *10.

Notably, the California Commission rejected the notion that the HFPL UNE price must be set at the amount the ILEC allocated to ADSL services (which was zero for Pacific Bell). The California commission stated:

> Even if ILECs allocated no direct costs in years past when they established price floors for their ADSL retail services, this does not necessarily make zero a correct TELRIC calculation today for data transport over the local loop in the year 2000 and beyond. That is, it is not unreasonable that TELRIC for the loop calculated today based on a system designed to service all of a customer's needs, including data as well as voice, might include some costs (e.g., capital, profit, economic depreciation, common, joint) for services other than voice. In fact, if transport of data is the future of telecommunications, it may be that xDSL services on the high frequency portion of the local loop cause all future loop costs, and voice services cause none. We agree with the result of the interim arbitration that we need not decide this now. At the same time, it

> would be unreasonable to find for purposes of the interim arbitration that zero cost is appropriate for, and no contribution is reasonable to, the local loop related to any TELRIC cost element, including, but not limited to, cost of capital, profit, economic depreciation, joint costs, and common costs.

Id. at 11.[30]

In sum, the Commission should follow the lead of these state commission that have adopted a positive price for the HFPL UNE, and reject the Proposed Order's unlawful recommendation to set the monthly recurring HFPL price at zero.

3. ADOPTION OF THE PROPOSED ORDER'S RECOMMENDED ZERO PRICE FOR THE HFPL UNE WOULD BE DISCRIMINATORY.

Another significant point the Proposed Order fails to acknowledge is that, if adopted by the Commission, a zero price for the HFPL UNE would have an adverse effect on other Broadband Service competitors and technologies. As Ameritech Illinois fully explained in its Brief on Rehearing (at 121-124), a zero price for the HFPL UNE would be discriminatory and distort the competitive market for advanced services by favoring CLECs that provide DSL service using the HFPL UNE over other competitors and other advanced services technologies.

DSL is just one of several technologies that are currently competing in the advanced services marketplace.[31] Cable modem, direct broadcast satellite ("DBS") and fixed wireless are

---

[30] As noted above, in its analysis, the FCC concluded that states could, if they chose to, set the price for the HFPL based on the loop cost that the ILEC imputes to its interstate ADSL services. *Line Sharing Order,* ¶ 139. In explaining this conclusion, the FCC acknowledged a desire to ensure that CLECs were not disadvantaged by paying a higher price than the ILEC includes in pricing its own ADSL services. *Line Sharing Order,* ¶ 141. Ameritech Illinois, however, does not offer advanced services, including ADSL services, in Illinois. Instead, Ameritech Illinois has established a separate affiliate that owns advanced services equipment and provides advanced services. Since Ameritech Illinois does not provide advanced services, such as ADSL, by providing two of its own services over a single loop, the FCC's concerns about disadvantages CLECs might face vis-à-vis the ILEC's own advanced service offerings do not apply to Ameritech Illinois. Similarly, since Ameritech Illinois has no ADSL service to which it is allocating loop costs, the FCC's suggestion on a possible pricing approach is also inapplicable to Ameritech Illinois.

[31] Cable modem service, for example, is established and expanding rapidly. The FCC released statistics on August 9, 2001 indicating that connections over coaxial cable systems increased by 57% during the final six months of the year 2000, to a total of 3.6 million. *High-Speed Services for Internet Access: Subscribership as of December 31,*

other ways of providing broadband services today (Tr. at 1181), and these types of providers are paying a positive price for the facilities they use to provide advanced services. It would give CLEC DSL providers an unfair competitive advantage over these other types of providers if they were able to obtain for free the facilities necessary to provide advanced services. As Staff's witness, Mr. Clausen, agreed during cross-examination, where there are several providers of advanced services technology, it would not promote efficient competition for one provider to pay nothing for the facilities necessary to provide the service, while the other providers must pay for the necessary facilities. Tr. at 1181-1183 (Clausen). Along this same line, establishing a zero monthly recurring price for the HFPL UNE, in a misguided effort to assist CLECs seeking to utilize the HFPL, would incent against the use of other technologies (such as broadband wireless and cable modem) and, therefore, would negatively impact the otherwise beneficial development of alternative sources of broadband services competition. In addition to discriminating against other advanced services providers and technologies, a zero price would discriminate against voice CLECs who may want to become providers of the HFPL UNE and against carriers that build their own facilities to provide service. *See* Am. Ill. Rhg. Br. at 121-124.

There is no more certain proof of this potential marketplace disruption than the fact that other advanced services providers, such as AT&T, have affirmatively opposed the establishment of a zero monthly HFPL recurring price in other proceedings because of the anti-competitive effect it would have. Indeed, Mr. Steven E. Turner (AT&T's witness in this proceeding on "line-splitting") testified in another proceeding that:

> a zero price for HFPL is both anti-competitive and unjustified when viewed in light of the entire telecommunications market place. A zero price means that data service providers, unlike other

---

2000, Industry Analysis Division Common Carrier Bureau Federal Communications Commission, August 2001 at *2; www.fcc.gov/ccb/stats.

> ILEC competitors, are permitted to use the loop without contributing to the carrier-paid subsidies that support the ILEC's local service. Moreover, a zero price for the HFPL permits the CLEC to bear no cost for one of the most important assets they utilize in providing their service.

Am. Ill. Ex. 3.1 (Carnall) at 19.

Mr. Turner also correctly testified (and Ameritech Illinois fully explained in its Brief on Rehearing at pages 121-124) that a zero price for the HFPL UNE will discriminate: (1) against voice service in favor of Internet access; (2) against carriers that support universal service in favor of carriers that do not; (3) against circuit switched technology in favor of DSL technology; and (4) against facilities-based competitors, who pay the full cost of the loop, in favor of entrants that would "free ride" on a critical component of the network. As Mr. Turner put it, "setting a $0 price for the HFPL will have long-lasting negative impacts on the development of competition for this new technology." Am. Ill. Ex. 3.0 (Carnall) at 19.

The bottom line is that sanctioning a zero monthly recurring price for the HFPL UNE in a market that otherwise is fully competitive would be unlawfully discriminatory, and would serve only to distort market conditions.

4. ADOPTION OF THE PROPOSED ORDER'S RECOMMENDED ZERO PRICE FOR THE HFPL UNE WOULD DISCOURAGE FACILITIES-BASED COMPETITION BY CLECS, AS WELL AS CONTINUED INVESTMENT IN FACILITIES BY AMERITECH ILLINOIS.

Aside from the anti-competitive effects, adoption of the Proposed Order's recommended zero monthly recurring price for the HFPL UNE would discourage facilities-based competition by CLECs, as well as continued investment in facilities by Ameritech Illinois. As fully explained in Ameritech Illinois' Brief on Rehearing (at 125-127), unless rejected by the Commission, the negative impact of a zero monthly recurring HFPL UNE price on investment and innovation would be significant.

Specifically, a zero monthly recurring price for the HFPL would discourage future investment and innovation by Ameritech Illinois. It would make little economic sense for Ameritech Illinois to incur actual costs to innovate and invest in its network if it ultimately is required to turn over its facilities to competitors for free. As even AT&T's CEO has recognized, "[n]o company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride in the investments and risks of others."[32] Or as Justice Breyer put it, "[n]or can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement." *IUB II*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part).

In addition to discouraging future investment by Ameritech Illinois, adoption of the Proposed Order's recommended zero monthly recurring price for the HFPL UNE would discourage CLECs from engaging in facilities-based competition, which is one of the primary goals of the 1996 Act. CLECs simply would have no reason to invest their own money in facilities if they can obtain them for free from Ameritech Illinois. Although unbundling obligations are useful as a stepping stone to facilities-based competition, they inevitably reduce investment incentives for both CLECs and ILECs. Again, as Justice Breyer stated, "[i]ncreased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *IUB II*, 525 U.S. at 429.

[32] Remarks of Michael C. Armstrong, Chairman and CEO of AT&T, delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998), available at http://www.att.com/speeches/item/0,1363,948,00.html.

In short, the Proposed Order's recommendation that Ameritech Illinois give away something valuable for nothing, and that CLECs be allowed to get something valuable for nothing, would serve only to discourage efficient investment and disrupt competition, and therefore should be rejected.[33]

5. THE APPROPRIATE MONTHLY RECURRING PRICE FOR THE HFPL UNE IS 50% OF THE UNBUNDLED LOOP PRICE.

There is ample support for Ameritech Illinois' proposal to set the monthly recurring price for utilizing the HFPL UNE at 50% of the Commission-approved monthly recurring unbundled loop price (plus the incremental facilities and operations costs caused by sharing the loop). *See* Am. Ill. Ex. 3.0 (Carnall) at 6-20. Adoption of Ameritech Illinois' proposed price would encourage data CLECs to enter the residential market by allowing CLECs to purchase the high frequency portion of the loop at a substantial discount, yet would not require Ameritech Illinois to "give away" the HFPL product. *See* Am. Ill. Rhg. Br. at 115-17. Moreover, unlike the Proposed Order's recommended zero price, a positive monthly recurring price for the HFPL UNE would encourage the deployment by CLECs of their own facilities, including their own loops, where it is economical to do so. Am. Ill. Ex. 3.0 (Carnall) at 6. Along this same line, a positive monthly recurring price for the HFPL UNE would assure that facilities-based providers, and advanced services providers using other broadband service technologies that actually pay a positive price for the facilities that they use to provide service, are not put at a competitive disadvantage. Am. Ill. Ex. 3.1 (Carnall) at 15-19. Perhaps most importantly, setting the monthly recurring price for the HFPL UNE at 50% of the unbundled loop price would be fully consistent

[33] As the California PUC found, "[i]t is unreasonable for an ILEC to sell any product or service at a zero price. Whether or not the ILECs are already recovering the full cost of the loop, it would not be acceptable to require the ILEC to 'give away' any product or service." *Rulemaking on the Commission's Own Motion to Govern Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks,* Rulemaking 93-04-003, Investigation 93-04-002, *Final Arbitrator's Report* (rel. May 26, 2000) ("*California Final Arbitrator's Report*") at 65 (*aff'd* by *Cal. Interim Opinion*").

with the FCC's TELRIC pricing principles. Under the FCC's TELRIC principles, the cost of a line-shared loop is a *shared* cost. Hence, that cost must be allocated between the two services that cause that cost.

As Ameritech Illinois explained in its Brief on Rehearing (at 115-17), the Commission should set the monthly recurring price for utilizing the HFPL UNE at 50% of the Commission approved monthly recurring unbundled loop price (plus the incremental facilities and operations costs caused by sharing the loop). Ameritech Illinois' pricing proposal comports with the express language of Section 706 and the pro-competitive goals of the 1996 Act, while the Proposed Order's recommended zero monthly recurring price for the HFPL UNE, on the other hand, does not.

B. THE PROPOSED ORDER'S RECOMMENDED ZERO CHARGE FOR OSS MODIFICATIONS IS UNLAWFUL.

As a preliminary matter, it is important to point out that the Proposed Order's recommendation to set the charge for HFPL-related OSS modifications at zero is *not* based on the notion that Ameritech Illinois is not incurring costs for such modifications. In fact, in its original Order in this docket, the Commission acknowledged that Ameritech Illinois likely is incurring costs as a result of OSS modifications. Order at 88. The CLECs do not dispute this fact. Rather, they want Ameritech Illinois to absorb the entire cost of the modifications. Given that Ameritech Illinois actually is incurring costs for HFPL-related OSS modifications, setting the price at zero and precluding recovery of those costs clearly would violate the Takings Clause of the U.S. Constitution and TELRIC principles, as discussed above.

In addition to violating the Takings Clause and TELRIC principles, the Proposed Order's zero price recommendation undeniably violates the FCC's determination that Ameritech Illinois and other ILECs *are* entitled to recover their HFPL-related OSS modification costs *from CLECs*. The FCC stated in paragraph 144 of its *Line Sharing Order*:

> We find that incumbent LECs should recover in their line sharing charges those reasonable incremental costs of OSS modification that are caused by the obligation to provide line sharing as an unbundled network element.

The Proposed Order's recommendation that Ameritech Illinois not recover from CLECs the HFPL-related OSS modifications that the Commission acknowledges it incurs cannot be reconciled with the *Line Sharing Order.*

The Proposed Order's recommendation to set the price for HFPL-related OSS modifications at zero is based on the claim that Ameritech Illinois purportedly "failed to present any persuasive evidence to support an OSS modification charge." The Proposed Order, however, wholly fails to specify precisely how Ameritech Illinois' evidence supposedly is lacking, and its assertion is plainly wrong. Contrary to the Proposed Order's assertion, Ameritech Illinois' proposed charge for HFPL-related OSS modifications is well-supported, reasonable and represents the costs that Ameritech Illinois actually will incur to modify its OSS systems to support CLEC access to the HFPL UNE. Ameritech Illinois developed this price based on the vendor's costs of implementing the HFPL-related OSS modifications, and on a product management demand forecast of the number of HFPL UNEs that will be provisioned over the next three years in SBC's 13-state serving area. This information was then used to compute the monthly cost per line on a present value basis. No party has presented evidence that Ameritech Illinois is not incurring these costs and, as noted above, in its initial Order in this docket, the Commission recognized that Ameritech Illinois incurs costs for OSS modifications.

Nor has any party established that the HFPL-related OSS modification costs presented by Ameritech Illinois are not reasonable.[34]

The Proposed Order identifies only one purported flaw in Ameritech Illinois' methodology—that its estimated demand for the HFPL UNE is supposedly too low.[35] Although the Proposed Order does not identify what it believes to be the appropriate demand estimate for the HFPL UNE, presumably the Proposed Order accepts the CLECs' assertion (made only during the initial phase of this docket, and *not* in the CLECs' case or briefs on rehearing) that Ameritech Illinois should have used the xDSL forecast included in SBC's October 1999 investor briefing, rather than the demand projections based on the Morgan Stanley Dean Witter report entitled "The Internet Data Services Report," dated August 11, 1999, which provided an end-of-the-year forecast for DSL lines for the years 1999 through 2009. Am. Ill. Ex. 4.1 (Smallwood) at 8; Schedule JRS-5 and 6. The record establishes, however, that the forecast contained in the investor briefing is inappropriate to use for at least three reasons. Am. Ill. Ex. 4.1 (Smallwood) at 9; Am. Ill. Rhg. Ex. 6.0 (Welch) at 5; Tr. 1210-11 (Koch).

First, this forecast is too high because it includes the xDSL lines SBC expects to serve *outside* the SBC 13-state region, not just the xDSL lines within the SBC 13-state region.

---

[34] Recovering these costs over a three-year period is appropriate for several reasons. Am. Ill. Ex. 4.0 (Smallwood) at 8-9. Among other things, the broadband market is rapidly evolving with new technological developments. As a result, the longer the period of time over which Ameritech Illinois spreads the recovery of these HFPL-related OSS modification costs, the more risk Ameritech Illinois faces that the OSS systems will become obsolete and that it will not recover the costs of the software upgrade. There is no good economic reason for Ameritech Illinois to bear such an undue risk of recovering the costs of a software upgrade incurred to benefit the CLEC community. It is also significant that Ameritech Illinois had to pay for the entire cost of the software upgrade *upfront*. It is not reasonable to require Ameritech Illinois to carry this cost on behalf of CLECs for any longer than three years. Additionally, given the current prices for DSL service in the retail market and the substantial monthly revenue potential for CLECs providing DSL service, Ameritech Illinois' proposed HFPL-related OSS modification charge does not constitute a barrier to entry into the advanced services market. Am. Ill. Ex. 4.1 (Smallwood) at 10-11.

[35] Although the Proposed Order on Rehearing does not specifically mention the demand forecast (or any other purported flaw in Ameritech Illinois' proposed price), it incorporated by reference the reasoning set forth in the March 14 Order, which, as stated in the text, identified only one purported flaw to Ameritech Illinois' methodology—the demand forecast.

Second, the investor briefing forecast includes *all* xDSL lines, not just line-shared xDSL lines. For example (and as Staff witness Mr. Koch acknowledged during cross-examination, (Tr. at 1210-1211)), the investor briefing forecast includes xDSL lines provided via Project Pronto and stand-alone loops. Simply put, the investor briefing forecast includes all potential xDSL customers, line shared or otherwise, and therefore is too high to reflect the demand for line-shared xDSL lines in the SBC 13-state region. Am. Ill. Ex. 4.1 (Smallwood) at 9; Am. Ill. Rhg. Ex. 6.0 (Welch) at 5**;** Tr. 1210-11 (Koch).

Third, and perhaps most importantly, the investor briefing forecast, and, indeed, the lower projection used by Ameritech Illinois itself, are *both* conservatively high when compared to the actual quantity of HFPL UNE orders received by SBC ILECs to date. The original forecast used by Ameritech Illinois assumed that there would be approximately 1.097 million SBC ILEC subscribers using the HFPL within the first twelve months of providing service. However, according to the actual number of HFPL UNE orders billed through April 1, 2001 by SBC ILEC subsidiaries, SBC now anticipates that its ILECs will receive only 1.001 million orders within the first twelve months. This is only 91% of the forecasted demand used by Ameritech Illinois to derive its proposed OSS modification charge. If Ameritech Illinois were to use the *actual* HFPL demand experience of the SBC ILECs, its proposed OSS modification charge would be *higher*. Am. Ill. Rhg. Ex. 6.0 (Welch) at 5-6.[36]

In sum, the HFPL-related OSS modification charge proposed by Ameritech Illinois is fully supported, reasonable and consistent with the FCC's *Line Sharing Order*. The Proposed Order's recommendation that Ameritech Illinois be precluded from recovering any of the costs

[36] Notably, even assuming that it is appropriate to use the demand forecast in the investor briefing instead of the forecast used by Ameritech Illinois (which it is not), the solution is *not* to completely deny recovery of HFPL-related OSS modification costs. Rather, the costs should be recalculated using the demand forecast in the investor briefing.

of such modifications violates the Takings Clause and TELRIC principles, and is directly contrary to the FCC's *Line Sharing Order*. Accordingly, the Commission should reject that recommendation and approve Ameritech Illinois' proposed HFPL-related OSS modification charge, which accurately represents the costs that Ameritech Illinois actually will incur to modify its OSS systems to support CLEC access to the HFPL UNE.

C. THE PROPOSED ORDER'S RECOMMENDED ZERO CHARGE FOR MANUAL LOOP QUALIFICATION IS UNLAWFUL.

The Proposed Order improperly recommends a zero charge for any manual loop qualification that Ameritech Illinois performs for CLECs as part of the HFPL UNE ordering and provisioning process. As with the HFPL-related OSS modification costs, it again is important to point out that the CLECs do not dispute that Ameritech Illinois actually performs manual loop qualifications for them and incurs costs to do so. Rather, the CLECs merely argue that they want that work to be performed for free. Staff also does not seem to dispute that Ameritech Illinois incurs costs for manual loop qualification. Staff argues that "Ameritech's proposed rate for manual loop configuration is reasonable," but nevertheless recommends that the Commission deny Ameritech Illinois any recovery of those costs. Staff Br. at 28. Given that it is undisputed that Ameritech Illinois actually performs manual loop qualifications for CLECs (because the *CLECs* demand it) and necessarily incurs costs to perform that work, the Commission cannot lawfully set the price for that service at zero. Indeed, denying Ameritech Illinois recovery of such costs would violate the Takings Clause and TELRIC principles, as explained above.

The Proposed Order provides no justification for recommending a zero charge other than its unsupported claim that "loop information is available in a mechanized format, so [Ameritech Illinois'] argument that it needs a manual loop qualification for information in a non-mechanized format is irrelevant." Proposed Order at 43. The Proposed Order's assumption that loop qualification information always is available in an electronic format lacks record support and is contrary to the facts.[37] There is no evidence that Ameritech Illinois' databases contain loop qualification information on every loop and, even if they did, that would not mean that the mechanized loop qualification process would successfully return loop information to the requesting CLEC in every instance. Although Ameritech Illinois generally provides a high percentage of accurate information in its mechanized loop qualification system, there will be situations where the mechanized loop qualification process is unable to return loop information to the requesting CLECs, even though the information is actually in Ameritech Illinois' systems. Am. Ill. Rhg. Ex. 6.0 (Welch) at 2.

Specifically, Ameritech Illinois sometimes is unable to return loop make-up information using the mechanized loop qualification process, because the data in ARES do not always match up with the data in LFACS. Am. Ill. Rhg. Ex. 6.0 (Welch) at 3. Aside from data mismatch problems, there are two other reasons why Ameritech Illinois' mechanized loop process may not be able to return loop make-up information to a requesting CLEC. *First*, the mechanized loop process does not work when the Working Telephone Number is working on a Universal Digital Carrier ("UDC"). UDC is carrier equipment placed at the customer premises that splits a cable pair into more than one pair. This equipment and additional pair are not inventoried in ARES and, therefore, Ameritech Illinois is unable to run a mechanized loop qualification inquiry on this

[37] The Proposed Order's assumption also completely disregards the fact that Ameritech Illinois is *not* required to have loop qualification information in an electronic format for every loop. Indeed, the FCC specifically found that ILECs are not required to provide loop make-up information in a mechanized format if it is not available: "We disagree, however, with Covad's unqualified request that the Commission require incumbent LECs to catalogue, inventory, and make available to competitors loop qualification information through automated OSS even when it has no such information available to itself." *UNE Remand Order*, ¶ 429. The FCC also has found that SWBT, which provides loop qualification information via a manual process for a charge, is compliant with the requirements of the *UNE Remand Order*. Similarly, in Docket No. 00-0592 (at 10), the Commission found that Ameritech Illinois may return loop qualification information "either via an electronic interface . . . or manually (if a LEC has not compiled such information for itself)" (quoting *OSS Arbitration Order* at 72).

pair. Further, the regular cable pair cannot be passed mechanically from LFACS to ARES, because the information is contained on a remark line. *Second*, Ameritech Illinois' mechanized loop process may be unable to return loop make-up information to the requesting carrier where the loop path to the Central Office crosses a wire center boundary. The mechanized loop qualification process can retrieve information only on a loop in one wire center at a time; therefore, if a loop crosses a wire center boundary, the process will fail at the boundary due to an invalid source. Am. Ill. Rhg. Ex. 6.0 (Welch) at 3-4.

In short, the record demonstrates that Ameritech Illinois' systems occasionally will be unable to return loop qualification information electronically and, in such instances, Ameritech Illinois incurs real costs to manually gather that information for the CLECs—costs that Ameritech Illinois must be permitted to recover.

The only other reason the Proposed Order gives for rejecting Ameritech Illinois' proposed manual loop qualification charge is because Ameritech Illinois purportedly could "avoid costs for manually collecting loop makeup information by allowing CLEC's [sic] direct access to LFACS and ARES." Proposed Order at 44. The Proposed Order's suggestion that Ameritech Illinois should permit direct access to its back office systems so that CLECs can perform manual loop qualifications themselves is directly at odds with the Proposed Order's recommendation (and the Commission's conclusion in Docket No. 00-0592) that CLECs are *not* entitled to directly access Ameritech Illinois' back office systems. Indeed, the Commission correctly found in Docket No. 00-0592, and the Proposed Order correctly recommends here, that there is no legal basis for allowing CLECs direct access to an ILEC's back office systems. Ameritech Illinois certainly should not be expected to permit such improper access to its systems so that CLECs can avoid paying the cost of manual loop qualification. This is particularly true given that manual loop qualification is rarely needed. Am. Ill. Rhg. Ex. 6.0 (Welch) at 2.

Moreover, permitting CLECs direct access to ARES and LFACS so that they can avoid paying for manual loop qualification is illogical for three additional reasons. *First,* as explained in Ameritech Illinois' Brief on Rehearing (at 102 n.123), part of the LFACS clerk's responsibility is to correct the error that caused the mechanized loop qualification request to fall out. If Ameritech Illinois were to voluntarily give CLECs direct access to ARES and LFACS, the CLECs would have read-only access—not write-access—and therefore would be unable to correct the error. As a result, subsequent requests for loop qualification information also would fall out, resulting in the need for additional manual loop qualifications, until Ameritech Illinois ultimately performed the manual loop qualification and corrected the error. Simply put, contrary to the Proposed Order's assumption, providing CLECs with direct access to ARES and LFACS in order to perform manual loop qualifications would not alleviate the need for Ameritech Illinois to perform the same work and correct the error that caused the mechanized request to fall out.

Second, under the Proposed Order's recommendation, Ameritech Illinois' proposed charge for manual loop qualification would be avoided only in instances where the CLEC actually wanted to directly access ARES and LFACS and perform the manual loop qualification itself. But this does not mean that the CLEC would avoid the *costs* of performing manual loop qualification. On the contrary, given the inefficiencies, difficulties, and on-going training costs that would be associated with direct access to Ameritech Illinois' back office systems (as fully explained in Ameritech Illinois' Brief on Rehearing at pages 101-12), it is highly likely that many CLECs will want Ameritech Illinois to perform the manual loop qualification rather than perform it themselves. Under those circumstances, the Proposed Order's recommendation would deny Ameritech Illinois recovery of the costs associated with performing the manual loop qualification, which, as explained above, would violate the Takings Clause and TELRIC principles.

Third, even if Ameritech Illinois could avoid the cost of performing manual loop qualification itself by allowing CLECs direct access to ARES and LFACS, any savings would be nullified (and far exceeded) by the substantial costs associated with permitting CLECs direct access to those back office systems. As fully explained in the direct testimony on rehearing of Mr. Waken, numerous expensive enhancements to the back office systems would be required before CLECs could be given direct access to those systems. Am. Ill. Rhg. Ex. 13.0 (Waken) at 24-28; Am. Ill. Rhg. Br. at 98-101. It simply would make no sense for Ameritech Illinois to incur these substantial costs (costs Ameritech Illinois would expect to recover from CLECs) just so CLECs can avoid paying twenty dollars in the rare instances where a manual loop qualification is necessary. Am. Ill. Rhg. Ex. 6.0 (Welch) at 2.

For the above reasons, the Commission should reject the Proposed Order's recommended zero charge for manual loop qualification and adopt Ameritech Illinois' proposed charge.

CONCLUSION

In sum, Ameritech Illinois respectfully requests that the Commission modify the Proposed Order in a manner consistent with the recommendations herein.

Respectfully submitted,

AMERITECH ILLINOIS

By:________________________
One of its Attorneys

Theodore A. Livingston
Christian F. Binnig
J. Tyson Covey
Kara K. Gibney
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Nancy J. Hertel
AMERITECH ILLINOIS
225 W. Randolph Street
Chicago, IL 60606
(312) 727-4517

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page